Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

JOHN W. EWING, ET AL.,
Petitioners,

VS.

CITY OF CARMEL BY-THE-SEA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

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March 20, 1992

QUESTIONS PRESENTED

1. **The Court of Appeal rejected the heightened scrutiny required by *Nollan v. California Coastal Commission* in subjecting the challenged land use regulation to the minimal rational basis review.**

2. **The decision below grants municipalities unfettered authority to limit residential use of property simply by designating it as commercial use.**

LIST OF PARTIES

The parties to the proceedings below were Petitioners John W. Ewing, Patricia M. Ewing, Dr. Edwin Aldous, John Gilmore, George Hynes, Tony Jaurique, Dr. Jerry Kimmel, William Lewis, Eveyln McMillan, John Sharp, Kenneth Smith, William Smith, Dr. Robert Taines, Alberta Peck, Dennis Hazelton, Jerry Cronen, Judith Sutter, George Tomajan, Hale Hunter, Anita Berman, Rupert Ricksen, Steven Anthony, Allen C. Fox, Glenn R. Affleck, Dr. Richard Boyer, Karna J. Boyer, Annette Casey, Dianne Deberry, Margo Devries, James Dougherty II, Dr. Robert Skor, Linda Skor, Mary Woodyard, Virginia L. Gibbons Trust, John Miller, Don Stafford, Jean Stafford, Louis Yiannikos, Daniel Yiannikos, Stan Lubeck, Dorothy Lubeck, Troy Padgett, Nancy Padgett, Ira Parrish, Jane Parrish, Doyle Moses, Seaton Prince, Burton Pike, Steve Rudy, Harry Wells, Bruce V. Britton, Barbara Britton, Jack Miller, Ione Miller, Jean Wolfe, Jack Rands, Dick Calder, Ernest Boekenoogen, William Yopel, Donald Whyte, Margorie Reid, Gerald Fronterhouse, Betty Lee Patton, Dr. James W. Hawkins, Glen E. Duke and Robert E. Ingham.

The Respondent before this Court is City of Carmel By-The-Sea, a political subdivision of the State of California.

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JOHN W. EWING, et al.,
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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

Petitioners John W. Ewing, et al., request that a writ of certiorari issue to review the judgment of the Court of Appeal of California, Sixth Appellate District, entered on October 9, 1991.

OPINION BELOW

The opinion of the Court of Appeal of California, Sixth Appellate District, is reported at 234 Cal. App. 3d 1979, 286 Cal. Rptr. 382 (1991), and reprinted in Appendix A. The summary decision by the California Supreme Court not to review the Court of Appeal judgment, dated January 8, 1992 (Appendix B), is not reported.

JURISDICTION

The judgment of the Court of Appeal of California, Sixth Appellate District, was entered on October 9, 1991, and a Petition for Rehearing denied on November 5, 1991. On January 8, 1992, the California Supreme Court denied a Petition for Review.

The jurisdiction of this Court to review the judgment of the Court of Appeal of California, Sixth Appellate District, is invoked under 28 U.S.C. section 1257(a) (1988).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

3. City of Carmel By-The-Sea Ordinance 89-17, set forth in full in Appendix C.

STATEMENT OF THE CASE

For many years Petitioners and others have owned residences in Respondent City of Carmel By-The-Sea ("Carmel") which they use as retirement or vacation homes. When they are not staying in these homes, Petitioners periodically rent them to help pay taxes, mortgages, and upkeep and to prevent them from being vacant. Petitioners do not rent their homes as a commercial enterprise, on a nightly basis, or as bed and breakfasts.

Carmel has attempted for several years to prohibit Petitioners from using their homes in this manner. In 1981 and 1982, Carmel enacted a series of ordinances making it a criminal offense to occupy or allow the occupancy of residences for less than 30 days. Several Petitioners challenged these ordinances and they were declared unconstitutional by the Monterey County Superior Court.

Several years later, Carmel enacted Ordinance 89-17, which is identical in purpose and effect to the earlier ordinances declared

unconstitutional. As did the prior ordinances, Ordinance 89-17 makes it a criminal offense to occupy or allow the occupancy of a home for less than 30 days for "remuneration." (*See* Appendix C, pp. 29a-30a.) Carmel purportedly enacted the Ordinance to eliminate the "unmitigatable adverse impacts" of noise, traffic, parking, and "light and glare" allegedly caused by short term occupancies. (*See* Appendix C, p. 25a.)

Petitioners commenced the action below by filing a lawsuit in Monterey County Superior Court challenging Ordinance 89-17 on its face as violating Petitioners' federal and state constitutional rights.

The Superior Court upheld the Ordinance as constitutional. Petitioners appealed and the Court of Appeal of California, Sixth Appellate District, affirmed the Superior Court judgment, finding that the Ordinance did not violate Petitioners' federal and state constitutional rights or constitute a taking. (*See* Appendix A, p. 1a.) The California Supreme Court denied Petitioners' request to review the Court of Appeal's decision. (*See* Appendix B, p. 24a.)

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEAL REJECTED THE HEIGHTENED SCRUTINY REQUIRED BY *NOLLAN V. CALIFORNIA COASTAL COMMISSION* IN SUBJECTING THE CHALLENGED LAND USE REGULATION TO THE MINIMAL RATIONAL BASIS REVIEW.

Petitioners argued below that the Ordinance worked a regulatory taking and thus must be tested against the heightened judicial scrutiny established by *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987). In *Nollan*, this Court placed constraints on the authority of municipalities to regulate land use and emphasized the need for careful scrutiny of justifications offered to support regulations restricting property rights. Under this test, a taking results if land use regulation does not "substantially advance legitimate state interests." *Nollan*, 483 U.S. at 834 n.3; *see also Agins v. Tiburon*, 447 U.S. 255, 260 (1980). The *Nollan* Court expressly rejected application of the rational basis test in regulatory taking cases. *Nollan*, 483 U.S. at 834 n.3.

Despite *Nollan*'s clean instructions to the contrary, the Court of Appeal reviewed Ordinance 89-17 under the rational basis standard of review, concluding that Carmel's goal to exclude short

term visitors was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety morals or general." *Ewing*, 234 Cal. App. 3d at 1592, 286 Cal. Rptr. at 388 (Appendix A, p. 13a) (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)). The opinion in *Euclid* is based on the Due Process Clause and not the Takings Clause.

By exercising the most minimal judicial scrutiny, the Court of Appeal failed to meaningfully review the Ordinance to determine if its deprivation of Petitioners' property rights "substantially advanced legitimate state interests."

At trial and on appeal, Carmel attempted to justify the Ordinance by boilerplate references to the recognized police power of controlling traffic, parking and noise. (*See* Appendix C, p. 25a.) However, Carmel offered no evidence that short term occupancies cause any of these problems. *Ewing*, 234 Cal. App. 3d at 1589, 1591, 286 Cal. Rptr. at 387-88, Appendix A, pp. 10a-11a. Had the Court of Appeal followed *Nollan*, it would have had no choice but to invalidate the Ordinance. Because there was no evidence that Petitioners' use of their homes caused the problems Carmel claimed the Ordinance was designed to address, the Ordinance could not "substantially advance" the elimination of these problems.

Faced with the absence of evidence that Petitioners' use of their homes had adverse impacts, in a labored effort to uphold the Ordinance the Court of Appeal created by sheer conjecture the facts it deemed necessary to sustain Ordinance 89-17. Without supporting evidence, the Court of Appeal declared it axiomatic that an essential characteristic of residential neighborhoods was that they are populated by permanent residents. Having created this axiom, it was a simple matter for the Court of Appeal to conclude that occupying homes on a less than permanent basis threatens the "essential character of a neighborhood and the stability of a community."[1]/ *Ewing*, 234 Cal. App. 3d at 1591, 286 Cal. Rptr. at 288, Appendix A, p. 11a.

The Court of Appeal's sociological dissertation on neighborhoods and community is not only unsupported by any evidence, and is based upon 70 year old precedent, *Euclid v. Ambler Co.*, *supra*, decided in 1926, and *Miller v. Board of Pub. Works*, 195 Cal. 477, 234 P. 381, decided in 1925, it does not recognize our increasingly mobile society and modern refinements in the law

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1/ The Court of Appeal found that at least 12% of residential homes in Carmel are "occupied not by permanent residents but by a stream of tenants staying a weekend, a week, over 29 days." *Ewing*, 234 Cal. App. 3d at 1592, 286 Cal. Rptr. at 387, Appendix A, p. 11a. This "evidence" was not introduced at trial, not properly before the Court of Appeal, and thus could not support the Court of Appeal's decision.

of property regulation. Petitioners have the right to use their homes as homes, regardless whether they do so on a short term or permanent basis.

Ordinance 89-17, as upheld by the Court of Appeal, substantially advances no legitimate state interest while depriving Petitioners of significant property rights. Both the Court of Appeal's reasoning and decision conflicts with *Nollan*, unfairly limits Petitioners' use of their homes, and invites municipalities to engage in unconstitutional regulation of property rights.

Moreover, in acknowledging that the Ordinance was enacted with the goal of populating Carmel's neighborhoods only with permanent residents, the Court of Appeal's opinion encourages local government to discriminate against non-permanent residents, i.e., "outsiders."

Ordinance 89-17 is but the latest in a series of Carmel's attempts to discourage outsiders from coming to Carmel. In 1971, in response to the Carmel City Council's concern over "undesirable visitors," i.e., hippies, Carmel passed an ordinance prohibiting sitting in the park. *Parr v. Municipal Court*, 3 Cal. 3d 861, 479 P.2d 353, 92 Cal. Rptr. 153, *cert. denied* 404 U.S. 869 (1971). To this day, Carmel grants permanent residents special parking privileges. (*See* Carmel Municipal Code

§ 10.32.140.) In attempting to enforce the 1981 and 1982 versions of Ordinance 89-17, Carmel monitored "suspicious" homes and license plates numbers and dispatched police officers to those homes to inquire whether the occupants were permanent residents.

Carmel's past and present attempts to discourage short term visitors is not a legitimate state interest. This Court has held that cities and states may not discriminate in favor of their own residents by burdening non-residents. *United Bldg. & Constr. Trades Council of Camden County & Vicinity v. Mayor & Council of City of Camden*, 465 U.S. 208, 221 (1984); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985). The Court of Appeal's opinion sanctions Carmel's efforts to construct an elitist moat around itself to exclude people it considers undesirable. If allowed to stand, this decision will encourage municipalities to discriminate against anyone considered to be an outsider.

The Court of Appeal ignored *Nollan*'s clear instruction that courts must exact land use regulations to heightened scrutiny to insure that government does not violate property rights under the guise of regulation. Unless reversed by this Court, the opinion below will invite local governments to unconstitutionally restrict property rights without fear of meaningful judicial review. The Court of Appeal's decision must be corrected.

II.

THE DECISION BELOW GRANTS MUNICIPALITIES UNFETTERED AUTHORITY TO LIMIT RESIDENTIAL USE OF PROPERTY SIMPLY BY DESIGNATING IT AS COMMERCIAL USE.

Petitioners do not dispute that municipalities have authority to prohibit commercial activities in residential areas. However, cities must exercise this authority within constitutional limits. *Schad v. Mt. Ephraim*, 452 U.S. 51, 68 (1981).

Carmel attempts to justify Ordinance 89-17 as a mere exercise of its zoning authority by claiming that the Ordinance is aimed solely at prohibiting "commercial" use in the residential zones. (*See* Appendix C, pp. 25a-26a.) However, Carmel cannot simply concoct its own self-serving and unrealistic definition of "commercial" use to prohibit Petitioners from using their property in what obviously is a residential use.

Ordinance 89-17 defines "commercial" use as giving or receiving "remuneration," i.e., "compensation," or "bargained for consideration," in return for staying in a home for less than 30 days. (*See* Appendix C, p. 27a.) The sole act of giving or receiving money or other compensation does not constitute commercial use of residential property. Commercial use of residential

property is use which interferes with the property's use or appearance as a home or with the aesthetic character of the neighborhood. *City of Beverly Hills v. Brady*, 215 P.2d 460, 461 (Cal. 1950); *Sechrist v. Municipal Court*, 64 Cal. App. 3d 737, 748, 134 Cal. Rptr. 733, 738 (1976); *Hardy v. Calhoun*, 383 S.W. 2d 652, 654 (Ct. of Ap. Tx. 1964); *see also Greenbier-Loverdale Home Owners Ass'n v. Baca*, 763 P.2d 1 (Ct. of Ap. Colo. 1988) [covenant limiting use to residential does not prohibit group home for disabled adults because such use is residential in nature].

For example, a drive-in or a convenience store may be prohibited as commercial uses in a residential zone, not because such operations engage in remunerative activities, but because the parking, traffic, and noise associated with such enterprises are inconsistent with a residential neighborhood.

However, a use involving remunerative activity, but without traffic, parking, and noise impacts, is not inconsistent with a residential neighborhood. There is no evidence that Petitioners' use of their homes caused any impacts which were not also caused by homes occupied by permanent residents. Petitioners' residential use of their homes therefore cannot be prohibited from a residential zone simply by calling it "commercial."

Carmel allows commercial and remunerative activities in its residential zones such as sculpture, metal arts, dance and music studios, private kindergartens, and nursery schools. (Carmel Municipal Code Chapter 17.24.) Yet Carmel fails to define these obviously remuneration activities as "commercial."

By the Court of Appeal accepting Carmel's assertion that it may prohibit any use of residential property if done for remuneration, it follows logically that Carmel could prohibit all rentals in the residential zones, not simply rentals for less than 30 days, because every rental is commercial and for remuneration. Furthermore, logically extending Carmel's argument would allow Carmel to outlaw authors writing and artists painting in their homes if they sell their work for remuneration.

Carmel's definition of "commercial," as approved by the Court of Appeal, is self-serving, unrealistic, arbitrary, and unconstitutional. Allowing the Court of Appeal's decision to stand will permit local governments to prohibit property owners from any residential use of their property which the government deems undesirable merely by branding it "commercial" use.[2/] It is

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[2/] Ordinance 89-17 is also unconstitutionally vague and overbroad in prohibiting occupancies for "remuneration." The Ordinance defines "remuneration" as "bargained for consideration given in return for occupancy . . . of real prop-

(continued...)

important for this Court to correct the Court of Appeal's sanction of this abuse of a municipality's zoning authority.

CONCLUSION

The Court of Appeal's decision misapprehends the constitutional standards to be applied to land use regulations. If allowed to stand, the decision will encourage municipalities to unconstitutionally restrict property rights and leave property owners with no

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[2]/(...continued)
erty." (*See* Appendix C, p. 27a.) This definition of "remuneration" is so vague that an ordinary person cannot know if houseswaps, housesitting, or performing yard work in return for weekend lodging is prohibited. *See Graynard v. City of Rockford*, 408 U.S. 104, 108-109 (1972). Attempting to provide clarity to the Ordinance, Carmel's attorney acknowledged at trial that housesitting, houseswapping, and an overnight guest treating his host to dinner were prohibited by the Ordinance. (*See* Appendix A, p. 17a.) However, Carmel's efforts to remedy the Ordinance's vagueness only renders it overbroad by prohibiting such constitutionally protected conduct as sharing our homes with whom we please.

meaningful judicial remedy. Petitioners request their Petition for Writ of Certiorari be granted.

DATE: March 20, 1992

Respectfully submitted,

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APPENDIX A

[No. H007702. Sixth Dist. Oct. 9, 1991.]

JOHN W. EWING et al., Plaintiffs and Appellants, v.
CITY OF CARMEL-BY-THE-SEA, Defendant and Respondent.

OPINION

ELIA, J.—Plaintiff homeowners challenge the constitutionality of a zoning ordinance prohibiting transient commercial use of residential property for remuneration for less than 30 consecutive days. The trial court upheld the ordinance. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are owners of single-family, residential property zoned R-1 in the City of Carmel-by-the-Sea. Plaintiffs challenge Ordinance No. 89-17, unanimously adopted by the Carmel City Council in May 1989. The ordinance prohibits the "Transient Commercial Use of Residential Property for Remuneration . . . in the R-1 District."

The ordinance defines the "transient commercial use of residential property" as "the commercial use, by any person, of Residential Property for bed and breakfast, hostel, hotel, inn, lodging, motel, resort or other transient lodging uses where the term of occupancy, possession or tenancy of the property by the person entitled to such occupancy, possession or tenancy is for less than thirty (30) consecutive calendar days." The ordinance defines "remuneration" as "compensation, money, rent, or other bargained for consideration given in return for occupancy, possession or use of real property."

The ordinance provides that "[a]ny Person acting as agent, real estate broker, real estate sales agent, property manager, reservation service or otherwise who arranges or negotiates for the use of Residential Property . . ." and "[a]ny Person who uses, or allows the use of, Residential Property in violation [of the ordinance] is guilty of an infraction for each day in which such Residential Property is used, or allowed to be used . . . ." To enforce the ordinance, "[t]he City Attorney may seek legal, injunctive, or other equitable relief . . . ."

Plaintiffs filed this action in June 1989, seeking declaratory and injunctive relief, as well as an award of damages for violation of their civil rights under 42 United States Code section 1983 and an award of attorney fees under 42 United States Code section 1988. In August 1989, the trial court preliminarily enjoined Carmel from enforcement of the ordinance. In October 1990, after trial, the court lifted the preliminary injunction and entered judgment for Carmel, finding the ordinance to be "valid and enforceable."

Plaintiffs appeal.

DISCUSSION

Plaintiffs contend the doctrine of collateral estoppel bars Carmel from adopting and litigating the validity of Ordinance No. 89-17. Assuming alternatively that collateral estoppel does not apply, plaintiffs contend the ordinance is constitutionally infirm in several respects. They maintain that it violates their rights of privacy and association, substantive and procedural due process, and equal protection.

We begin with plaintiffs' argument regarding collateral estoppel. A decade ago, Carmel enacted a series of ordinances by which it sought to regulate transient rentals. While the final version adopted in 1981 was worded quite differently from the version at issue here, the intent and effect were essentially the same. The 1981 ordinance, like Ordinance No. 89-17, prohibited the rental of residential property for fewer than 30 days.

Some of the same homeowners involved in this suit challenged the earlier ordinances. The trial court permanently enjoined enforcement of the 1981 ordinance, finding it to be "unconstitutional as it invades the rights of association, privacy, and due process. The Court further finds that the Ordinance is over-broad and does not substantially effect its stated goals." Carmel did not appeal. Plaintiffs maintain that Carmel is collaterally estopped from relitigating the matter.

Given the difference in wording of the two ordinances, we think it doubtful the doctrine of collateral estoppel applies. In any event, we conclude that this case comes within the public interest exception to application of the doctrine.

In *Louis Stores, Inc. v. Department of Alcoholic Beverage Control* (1962) 57 Cal.2d 749 [22 Cal.Rptr. 14, 371 P.2d 758], the district liquor control administrator instituted successive proceedings seeking to revoke the beer and wine wholesale license of a chain of retail grocery stores. The first proceeding was resolved in the stores' favor. The second proceeding challenged the stores' operations during a different period of time and under a revised statute. But the stores argued that the administrator was collaterally estopped from relitigating the matter because neither the statute nor the stores' methods of operation had significantly changed since the first proceeding. The Supreme Court observed that res judicata should not be applied when it may have an

adverse effect on third parties or when public interest requires that relitigation not be foreclosed. (*Id.* at p. 758.) "In the present case both of these factors, i.e., public interest and effect upon third persons, strongly indicate that the prior determination of the board should not operate to preclude either the department or the courts from reexamining the statute and applying the correct interpretation . . . . " (*Ibid.*) The court noted that the statute "concerns the public interest in an industry requiring close supervision and that it is an important part of an integrated and rather complex licensing and price regulating system." (*Ibid.*)

In *Chern v. Bank of America* (1976) 15 Cal.3d 866, 872 [127 Cal.Rptr. 110, 544 P.2d 1310], the Supreme Court again "acknowledge[d] . . . a sound judicial policy against applying collateral estoppel in cases which concern matters of important public interest." The court approved plaintiff's relitigation of certain banking practices, noting that federal and state statutes "evidence[ ] a strong interest in protecting the public through . . . comprehensive scheme[s] of banking and financial regulations." (*Ibid.*) The court concluded: "Given the quality and intensity of the public interest involved, a reexamination of the legal significance of recurring factual events in which the same plaintiff is involved should not be foreclosed under collateral estoppel principles." (*Id.* at p. 873; see also *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64-65 [266 Cal.Rptr. 139, 785 P.2d 522]; *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902 [160 Cal.Rptr. 124, 603 P.2d 41].)

Similarly, a city and its residents have an abiding and continuing interest in zoning. And a zoning ordinance that does not pass muster today may—due to changed circumstances, changed language, or changed goals—pass muster only a few decades later. We conclude that, even if the doctrine of collateral estoppel were

otherwise applicable, the public interest exception to the doctrine permits a zoning authority to try again.

We turn to the constitutionality of Ordinance No. 89-17, beginning with plaintiffs' argument that the ordinance constitutes a "taking" in violation of the Fifth Amendment. (U.S. Const., 5th Amend. ["No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."]; *Chicago, Burlington &c. R'd. Chicago* (1897) 166 U.S. 226, 235-241 [41 L.Ed. 979, 984-986, 17 S.Ct. 581] [Fifth Amendment applies to the states through the Fourteenth Amendment].) Although plaintiffs offer their "taking" argument almost as an afterthought by way of supplemental briefing, we view it as the logical starting point for our constitutional analysis.

The dawn of the 20th century marked the beginning of zoning laws in this country. (*Euclid v. Ambler Co.* (1926) 272 U.S. 365, 386 [71 L.Ed. 303, 310, 47 S.Ct. 114 54 A.L.R. 1016].) Until then, "urban life was comparatively simple . . . . " (*Ibid.*) But the "great increase and concentration of population" and "the advent of automobiles and rapid transit street railways" created problems necessitating land-use regulation. (*Id.* at pp. 386-387 [71 L.Ed. at p. 310].) In *Euclid v. Ambler Co.*, the Supreme Court confronted for the first time a comprehensive zoning scheme, dividing the Village of Euclid, Ohio, into six use districts, which were further divided according to the permissible size of lots and height of buildings. Plaintiff landowner sought to enjoin enforcement of the Euclid ordinances, contending they deprived him of liberty and property without due process of law and deprived him of equal protection of law.

The Supreme Court declared that zoning regulations must find their justification in the police power, asserted for the public

welfare. (*Euclid v. Ambler Co.*, *supra*, 272 U.S. at p. 387 [71 L.Ed. at p. 310].) The court noted that the extent of the police power "varies with circumstances and conditions." (*Ibid.*) Likewise, "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." (*Ibid.*)

The Supreme Court examined the reasons for comprehensive zoning and, particularly, for setting aside residential districts. In fact, in the court's view, "[t]he serious question in the case arises over the provisions of the ordinance excluding from residential districts, apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded." (*Euclid v. Ambler Co.*, *supra*, 272 U.S. at p. 390 [71 L.Ed. at pp. 311-312].) The court observed that nonresidential uses may have an increasingly deleterious impact on a residential district "until, finally, the residential center of the neighborhood and its desirability as a place of detached residences are utterly destroyed." (*Id.* at p. 394 [71 L.Ed. at p. 313].)

The Supreme Court upheld the Euclid ordinances as a proper exercise of the police power. The court concluded that even if Euclid's reasons for adopting the scheme, such as the preservation of residential areas, "do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial

relation to the public health, safety, morals, or general welfare." (*Euclid v. Ambler Co.*, *supra*, 272 U.S. at p. 395 [71 L.Ed. at p. 314].)

Shortly before *Euclid* was decided, the California Supreme Court dealt with zoning ordinances in *Miller v. Board of Public Works* (1925) 195 Cal. 477 [234 P. 381, 38 A.L.R. 1479]. The City of Los Angeles issued plaintiff a permit for construction of a four-family flat. The city then revoked the permit pending adoption of a comprehensive zoning plan that would prohibit construction of a four-family flat on plaintiff's land. Plaintiff challenged the city's authority to enact zoning ordinances.

Like the court in *Euclid,* the court in *Miller* stressed the elasticity of the police power: "as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power." (*Miller v. Board of Public Works*, *supra*, 195 Cal. at p. 494; see current Cal. Const., art XL § 7 [a city may "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws"].) After concluding that zoning is indeed within the police power, the *Miller* court found that the Los Angeles zoning scheme was reasonably necessary to the public health, safety, morals or general welfare and that the scheme of districting and classification was fair and impartial. (195 Cal. at p. 489.)

The *Miller* court set forth what it considered to be the critical question regarding zoning: "whether or not there may be legally established, as a part of a comprehensive zoning plan, strictly private residential districts from which are excluded and absolute-

ly prohibited general business enterprises, apartments, tenements, and like structures." (*Miller v. Board of Public Works*, *supra*, 195 Cal. at p. 490.) Not only was the *Miller* court's question nearly the same as the "serious question" set forth in *Euclid,* but so also was the answer. "We are of the opinion that it may be done; that the establishment of [residential] districts as a part of a systematic and carefully considered and existing zoning plan is a legitimate exercise of the police power delegated to the municipality." (Ibid.)

As we near the end of the twentieth century, the courts continue to confront a myriad of zoning disputes. The issues have evolved, often reflecting the increased affluence and mobility of some elements in our modern society. The law has also evolved, but the basic principles survive. Zoning ordinances are still presumptively constitutional. (*Goldblatt v. Hempstead* (1962) 369 U.S. 590, 594 [8 L.Ed.2d 130, 133-134, 82 S.Ct. 987]; *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 604-605 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038].) But "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge,* 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 138, n. 36 (1978). The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, see *Kaiser Aetna v. United States,* 444 U.S. 164 (1979), the question necessarily requires a weighing of private and public interests." (*Agins v. Tiburon* (1980) 447 U.S. 255, 260-261 [65 L.Ed.2d 106, 112, 100 S.Ct. 2138].)

In passing Ordinance No. 89-17, Carmel sought to implement goals set forth in its 1988 revised general plan. (See Gov. Code, § 65860 [zoning ordinance must be consistent with general plan].) Objective O1-12 states, for example: "Intensify enforcement of zoning codes to maintain the residential character of the city." Policy PI-37 provides: "Review and develop measures to restrict commercial short term rental of single family residences in the R-1 district." Policy P3-12 provides: "Preserve existing permanent housing and maintain the vital residential character of Carmel-by-the-Sea. Prohibit expansion of visitor oriented commercial uses such as transient rentals." Policy P3-18 provides: "Encourage the conversion of commercial transient housing to housing for permanent residents."

In the findings and purposes appended to Ordinance No. 89-17, the city council observed: "The purpose of the R-1 District is to provide an appropriately zoned land area within the City for permanent single-family residential uses and structures and to enhance and maintain the residential character of the City." The council found that the use of single-family residential property for transient lodging was a commercial use inconsistent with the purpose of the R-1 District. Moreover, "[c]ommercial use of single-family residential property for such purposes create unmitigatable, adverse impacts on surrounding residential uses including, but not limited to, increased levels of commercial and residential vehicle traffic, parking demand, light and glare, and noise detrimental to surrounding residential uses and the general welfare of the City. Such commercial use may increase demand for public services, including, but not limited to, police, fire, and medical emergency services, and neighborhood watch programs."

Plaintiffs submit declarations intended to show that transient use of R-1 property does not create the "unmitigatable, adverse impacts" cited by the council. A paralegal reports she examined

the Carmel Police Department's press log for the past two years and found just one "disturbing the peace" complaint and only five complaints of "blocked driveway" in the R-1 District. She found no complaints regarding "light and glare," "noise," or "transient rental use." The operator of a residential housecleaning service in the R-1 District for the past two years declares that he cleans "vacation homes" no differently from "permanent homes." He parks his car in the driveway of the house being cleaned and makes no more noise than would a homeowner cleaning his own house. He has never had any complaints from neighbors or from Carmel regarding activities connected to his service. John W. Ewing, the lead plaintiff in this action, declares that his home in the R-1 District is vacant approximately 40 to 50 percent of the time. When rented through a broker, it is occupied for at least one week by no more than one family or two couples. No maid, linen, or food service is provided. Ewing has never had complaints from his neighbors or from Carmel regarding use of his property.

While plaintiffs have presented some evidence to counter the council's finding that transient rentals increase traffic, parking demand, light and glare, noise, and the need for public services, they have not met Carmel's chief purpose in adopting Ordinance No. 89-17—"to provide an appropriately zoned land area within the City for permanent single-family residential uses and structures and to enhance and maintain the residential character of the City."

In *Miller and Euclid,* the highest courts of this state and of the land recognized that maintenance of the character of residential neighborhoods is a proper purpose of zoning. The California Supreme Court employed language now a bit dated yet plainly relevant to the case at hand: "[W]e think it may be safely and sensibly said that justification for residential zoning may, in the

last analysis, be rested upon the protection of the civic and social values of the American home. The establishment of such districts is for the general welfare because it tends to promote and perpetuate the American home. It is axiomatic that the welfare, and indeed the very existence of a nation depends upon the character and caliber of its citizenry. The character and quality of manhood and womanhood are in a large measure the result of home environment. The home and its intrinsic influences are the very foundation of good citizenship, and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement not only of community life but of the life of the nation as a whole." (*Miller v. Board of Public Works*, *supra*, 195 Cal. at p. 493.) The court observed that with home ownership comes stability, increased interest in the promotion of public agencies, such as schools and churches, and "recognition of the individual's responsibility for his share in the safeguarding of the welfare of the community and increased pride in personal achievement which must come from personal participation in projects looking toward community betterment." (*Ibid.*)

It stands to reason that the "residential character" of a neighborhood is threatened when a significant number of homes—at least 12 percent in this case, according to the record—are occupied not by permanent residents but by a stream of tenants staying a weekend, a week, or even 29 days. Whether or not transient rentals have the other "unmitigatable, adverse impacts" cited by the council, such rentals undoubtedly affect the essential character of a neighborhood and the stability of a community. Short-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow—

without engaging in the sort of activities that weld and strengthen a community.

Plaintiffs attempt to equate this case with *Parr v. Municipal Court* (1971) 3 Cal.3d 861 [92 Cal.Rptr. 153, 479 P.2d 353], in which the Supreme Court confronted a Carmel zoning ordinance prohibiting, among other things, sitting or lying upon public lawn. The ordinance was accompanied by a "Declaration of Urgency" explaining that it was geared toward "'an extraordinary influx of undesirable and unsanitary visitors to the City, sometimes known as "hippies" . . . .'" (*Id.* at p. 863.) The court concluded that the ordinance violated appellant's right of equal protection by discriminating against a social class. Plaintiffs quote from the concurrence in *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 825 [226 Cal.Rptr. 81, 718 P.2d 68]: "An impermissible elitist concept is invoked when a community constructs a legal moat around its perimeter to exclude all or most outsiders." Plaintiffs argue that the ordinance challenged in *Parr* and Ordinance No. 89-17 demonstrate Carmel's desire to build a legal moat. The ordinance challenged in *Parr* was struck down; thus, plaintiffs reason, Ordinance No. 89-17 should meet the same fate.

We view the ordinance here as very different from that in *Parr,* in which Carmel sought to ban entirely a certain element from the community. By Ordinance No. 89-17, Carmel does not seek entirely to ban short-term visitors. Indeed, we suspect that short-term visitors provide an economic boon that Carmel would be loath to eliminate. Rather, Carmel wishes simply to confine the accommodations for short-term visitors to areas outside the R-1 District—where, according to the record, there are approximately 950 such transient units.

Blessed with unparalleled geography, climate, beauty, and charm, Carmel naturally attracts numerous short-term visitors. Again, it stands to reason that Carmel would wish to preserve an enclave of single-family homes as the heart and soul of the city. We believe that this reason alone is "sufficiently cogent to prelude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *(Euclid v. Ambler Co., supra,* 272 U.S. at p. 395 [71 L.Ed. at p. 314].)

A zoning ordinance does not constitute a taking simply because it narrows a property owner's options. In fact, "[m]any zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property." *(Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 498 (94 L.Ed.2d 472, 496, 107 S.Ct. 12321; see, e.g., *Griffin Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256 [217 Cal.Rptr. 1, 703 P.2d 339] [condominium conversion ordinance); *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129 [130 Cal.Rptr. 465, 550 P.2d 1001][rent control law].) Justice Holmes stated the test in *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 413 [67 L.Ed. 322, 325, 43 S.Ct. 158, 28 A.L.R. 1321]: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts."

Ordinance No. 89-17 leaves plaintiffs with several economically viable uses of their property. Plaintiffs may live in their homes permanently or occasionally. They may rent their homes for remuneration for at least 30 days. They may allow others to use their homes, without remuneration, for any length of time. They may sell their homes or otherwise encumber them. The only thing they may not do, under the terms of Ordinance No. 89-17, is operate their homes as "bed and breakfast, hostel, hotel, inn, lodging, motel, resort or other transient lodging . . . ." The intrusion into plaintiffs' bundle of ownership rights—"the extent of the diminution," in Justice Holmes's words—is minimal and far outweighed by the public interest in enhancing and maintaining permanent residential areas.

Plaintiffs insist, however, that Carmel has acted arbitrarily by restricting transient commercial use of residential property while other commercial uses are allowed. Carmel Ordinance No. 17.24.020 permits home occupations in the R-1 District, including "painting and related graphics, music, dance, dramatics, sculpture, writing, photography, weaving, ceramics, needlecraft, jewelry, glass and metal crafts." Carmel Ordinance No. 17.24.030 allows the issuance of use permits for private kindergartens and nursery schools in the R-I District. Plaintiffs contend that these uses result in even greater "unmitigatable, adverse impacts" than the uses prohibited by Ordinance No. 89-17.

Whether or not home occupations increase traffic and parking problems and other adverse impacts, they do not threaten the basic character of a residential neighborhood. Rather, they strengthen the community by fostering the talents of its residents. (See *County of Butte v. Bach* (1985) 172 Cal.App.3d 848, 865 [218 Cal.Rptr. 613][home occupation exception in a zoning ordinance "implicitly premised upon expectations that the number and distribution of such encroachments will not be intolerable and that

persons who live where they work are likely to have less detrimental impact than nonresidents"].) Similarly, local kindergartens and nursery schools keep toddlers close to home, enhancing the quality of life and the stability of the community.

Plaintiffs also complain that Carmel has drawn the line arbitrarily by permitting rentals of 30 consecutive days but not 29. Line drawing is the essence of zoning. Sometimes the line is pencil-point thin—allowing, for example, plots of one-third acre but not one-fourth buildings of three floors but not four, beauty shops but not beauty schools. In *Euclid,* the Supreme Court recognized that "in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." *(Euclid v. Ambler Co., supra,* 272 U.S. at p. 389 [71 L.Ed. at p. 311].) Nonetheless, the line must be drawn, and the legislature must do it. Absent an arbitrary or unreasonable delineation, it is not the prerogative of the courts to second-guess the legislative decision. (See *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 8 [39 L.Ed.2d 797, 803-804, 94 S.Ct. 1536]; *Berman v. Parker* (1954) 348 U.S. 26, 35-36 [99 L.Ed. 27, 39-40, 75 S.Ct. 98].)

In this case, it appears that Carmel did not wish to discourage month-to-month tenancies. Indeed, long-term tenants may create as stable a community as resident homeowners. Through Ordinance No. 89-17, Carmel wished to curtail only short-term occupancies for remuneration. We believe that the 30-day cutoff is not arbitrary but, rather, reasonably linked to that goal. (See Rev. & Tax. Code, § 7280 [establishing 30-day cutoff for city or county tax upon short-term occupancy in "hotel, inn, tourist home or house, motel, or other lodging"]; Civ. Code, § 1943 [tenancy presumed to be month-to-month unless otherwise designated in writing].)

Plaintiffs offer yet another Fifth Amendment argument, contending that Ordinance No. 89-17 is unconstitutionally vague and overbroad. Indeed, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process." (*Connally v. General Const Co.* (1926) 269 U.S. 385, 391 [70 L.Ed. 322, 328, 46 S.Ct. 126].) In *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108 [33 L.Ed.2d 222, 227, 92 S.Ct. 2294], the Supreme Court observed that a vague law may offend "several important values." First, the person of ordinary intelligence should have a reasonable opportunity to know what is prohibited. A vague law may trap the innocent by not providing fair, warning. Second, a vague law impermissibly delegates the legislative job of defining what is prohibited to policemen, judges, and juries, creating a danger of arbitrary and discriminatory application. Third, a vague law may have a chilling effect, causing people to steer a wider course than necessary in order to avoid the strictures of the law.

Yet, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." (*Grayned v. City of Rockford*, *supra*, 408 U.S. at p. 110 [33 L.Ed.2d at pp. 228-229], fn. omitted.) "Often the requisite standards of certainty can be fleshed out from otherwise vague statutory language by reference to any of the following sources: (1) long established or commonly accepted usage; (2) usage at common law; (3) judicial interpretations of the statutory language or of similar language; (4) legislative history or purpose. [Citation.] While the dangers of discriminatory enforcement and ex post facto punishment posed by vague penal provisions must be considered in construing statutory language [citation], liberal regard will be given to legislative intent so as to give effect to the salutary objects of the particular law. [Citations.]" (*Sechrist v. Municipal Court* (1976) 64

Cal.App.3d 737 745 [134 Cal.Rptr. 733].) "In fact, a substantial amount of vagueness is permitted in California zoning ordinances . . . ." (*Novi v. City of Pacifica* (1985) 169 Cal.App.3d 678, 682 [215 Cal.Rptr. 439] [antimonotony ordinance]; see also *Guinnane v. San Francisco City Planning Com.* (1989) 209 Cal.App.3d 732 [257 Cal.Rptr. 742] [residential character ordinance].)

In his declaration, plaintiff John Ewing criticizes Ordinance No. 89-17 as follows: "I do not know if the term 'remuneration' prohibits house-swaps, house-sitting, pet-sitting, or allowing someone to use my house in return for bartered consideration, dinner, or house or yard work. I also do not know whether the 'remuneration' has to be viewed from my point of view or my guests'. For example, many of my guests agree to use my Carmel home, either alone or when I am also present, only on condition they be allowed to do something for me in return. In some cases, I consider this clearly a 'bargained for consideration.' In other cases I do not, but I know my guests consider it bargained for consideration. Am I violating the ordinance in both cases, or only those in which I consider the deal to have been 'bargained for?' If it is only when I consider it 'bargained for,' how will Carmel distinguish between different owner's interpretations of their friends' or guests' insistence that they be allowed to do something for the homeowner in exchange for the right to occupy the residence?"

In fact, Carmel's attorney acknowledged at trial that house-sitting and house swapping could be viewed as "bargained for consideration." Even a host and his overnight guest who treats him to dinner might find themselves on the wrong side of the ordinance.

At this point, we do not presume to know how expansively Carmel will interpret Ordinance No. 89-17. Although a very broad reading of 'remuneration" or "bargained for consideration" might lead to absurd applications, as Carmel's attorney admitted, the legislative purpose is clearly to prohibit transient *commercial* use of residential property. The word "commercial" appears repeatedly at every critical juncture in the ordinance. As the court observed with respect to zoning matters in *Sechrist v. Municipal Court, supra,* 64 Cal.App.3d at page 746, "[t]he term 'residential' is normally used in contradistinction to 'commercial' or 'business.'" (See also *City of Beverly Hills v. Brady* (1950) 34 Cal.2d 854, 856 [215 P.2d 460] ["Whether the questioned activities amount to the conduct of a business depends upon the adopted definition of that word and the primary intent of the zoning restrictions."].)

Plaintiffs complain that Carmel's use of the word "commercial" in Ordinance No. 89-17 is "self-serving, unrealistic, and legally incorrect." To the contrary, we view Carmel's repeated use of the word as strong evidence that Carmel intends only to prevent homeowners in the R-1 District from operating like a "bed and breakfast, hostel, hotel, inn, lodging, motel, resort or other transient lodging . . . ." In our experience, such establishments do not normally engage in house-swaps, house-sitting, pet-sitting, or permit customers to pay by treating the proprietor to dinner or by doing yard work. Given the repeated use of the word "commercial," we do not discern an intention by Carmel to police bread-and-butter gifts. We believe that Ordinance No. 89-17 is sufficiently clear to allow people of common intelligence to understand its meaning.

Finally, we turn to plaintiffs' contention that Ordinance No. 89-17 violates their constitutional rights of substantive due process and equal protection. They argue first that the ordinance infringes

upon their rights of freedom of association and of privacy guaranteed by the federal and state Constitutions. (See U.S. Const., 1st, 3d, 4th, 5th, & 9th Amends.; *Griswold v. Connecticut* (1965) 381 U.S. 479 [14 L.Ed.2d 510, 85 S.Ct. 1678]; Cal. Const., art. I, §1; *White v. Davis* (1975) 13 Cal.3d 757 [120 Cal.Rptr. 94, 533 P.2d 222].) Because these are fundamental rights (see *Griswold v. Connecticut, supra,* 381 U.S. at pp. 484-486 [14 L.Ed.2d at pp. 514-516] [privacy]; *N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 460-461 [2 L.Ed.2d 1488, 1498-1499, 78 S.Ct. 1163] [association]), they contend the ordinance is not presumed valid, as would be the normal zoning ordinance. Rather, they maintain that Carmel has the burden of demonstrating that the infringement upon constitutional rights is necessary to meet a compelling public need and that the ordinance is the least intrusive means of meeting that need. (See *Moore v. East Cleveland* (1977) 431 U.S. 494, 499 [52 L.Ed.2d 531, 537-538, 97 S.Ct. 19321; *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213 [211 Cal.Rptr. 398, 695 P.2d 695].)

Second, plaintiffs argue that even if the ordinance does not infringe upon fundamental rights, it still violates substantive due process and equal protection because it is not rationally related to the goals sought to be achieved. (See *Village of Belle Terre v. Boraas, supra,* 416 U.S. at p. 8 [39 L.Ed.2d at pp. 803-804]; *Roman Cath. etc. Corp. v. City of Piedmont* (1955) 45 Cal.2d 325, 331 [289 P.2d 438].)

We have already determined that the ordinance is rationally related to the stated goal. Carmel wishes to enhance and maintain the residential character of the R-1 District. Limiting transient commercial use of residential property for remuneration in the R-1 District addresses that goal. We have also concluded there is a rational basis for the 30-day cutoff and for the allowance of home occupations in the R-1 District despite the prohibitions

contained in Ordinance No. 89-17. Plaintiffs rely upon *Roman Cath. etc. Corp. v. City of Piedmont, supra,* in which the California Supreme Court struck down an ordinance prohibiting private schools in an area where public schools were allowed, finding no rational basis for distinguishing one from the other. The case is inapposite. Carmel has not prohibited one kind of transient commercial use while permitting another comparable use. Rather, through Ordinance No. 89-17, Carmel has prohibited all transient commercial use of residential property for remuneration.

Further, a review of a few of the cases relied upon by plaintiffs shows that this case is not within the ambit of association or privacy rights. Plaintiffs rely particularly upon *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123 [164 Cal.Rptr. 539, 610 P.2d 436, 12 A.L.R.4th 219], in which the California Supreme Court struck down an ordinance prohibiting housekeeping units of more than five persons unrelated by blood, marriage, or adoption. The court concluded that there was no nexus between the "rule-of-five" and the city's goal of maintaining residential character. "'The fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved. . . . As long as a group bears the "generic character of a family unit as a relatively permanent household," it should be equally as entitled to occupy a single family dwelling as its biologically related neighbors."' (*Id.* at p. 134, quoting from *State v. Baker* (1979) 81 N.J. 99 [405 A.2d 368, 371-372].)

In *Robbins v. Superior Court, supra,* the California Supreme Court concluded that plaintiffs were likely to succeed on their claim that certain aspects of the defendant county's general assist-

ance program were unconstitutional. Under the program, single, employable residents were not eligible for cash benefits but only for "in-kind" benefits, meaning food and shelter at a county facility. Because the assistance program likely interfered with plaintiffs' rights of association and privacy, the court held that the trial court erred in refusing to issue a preliminary injunction.

In *Park Redlands Covenant Control Committee v. Simon* (1986) 181 Cal.App.3d 87 [226 Cal.Rptr. 199], the court declared unconstitutional a private restrictive covenant that limited the maximum number of occupants per unit to three. In *Atkisson v. Kern County Housing Authority* (1976) 59 Cal.App.3d 89 [130 Cal.Rptr. 375], the court declared unconstitutional a county housing authority policy prohibiting a low-income public housing tenant from living with a member of the opposite sex to whom the tenant was not related by blood, marriage, or adoption. In each case, the court determined that the rule interfered with the complainants' right to privacy by restricting with whom they could live.

In *Moore v. East Cleveland,* the United States Supreme Court struck down an ordinance limiting the occupancy of a single dwelling unit to members of a single "family" and defining "family" so as to prohibit even related individuals from living together in certain instances. When the government so intrudes upon family living arrangements, the court declared, "the usual judicial deference to the legislature is inappropriate." *(Moore v. East Cleveland, supra,* 431 U.S. at p. 499 [52 L.Ed.2d at p. 537].) The court distinguished the case from *Village of Belle Terre v. Boraas,* in which the court upheld an ordinance that limited the ability of unrelated individuals to live together but placed no limitation upon those related by blood, marriage, or adoption. The court noted that the Belle Terre ordinance promoted "family needs" and "family values." (*Village of Belle Terre v. Boraas,*

supra, 416 U.S. at p. 9 [39 L.Ed.2d at p. 804].) Achieving just the opposite, the East Cleveland ordinance "slic[ed] deeply into the family itself." (*Moore v. East Cleveland, supra,* 431 U.S. at p. 498 [52 L.Ed.2d at p. 538].)

Ordinance No. 89-17 differs sharply from the ordinances, policies, and covenants declared unconstitutional in the cases cited by plaintiffs. The rule challenged in each of those cases prohibited cohabitation by certain people or groups of people. In effect, each rule governed with whom residents could reside, based upon the number of people or upon their familial relationship. The ordinance here does no such thing. Plaintiffs are free to live with whom they wish. They may entertain whom they wish. They may rent to whom they wish—the only condition being that the occupancy, possession, or tenancy last at least 30 consecutive calendar days. As the Supreme Court emphasized in *City of Santa Barbara v. Adamson, supra, 27* Cal.3d at page 133, *"In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users."* The ordinance here does just that. It prohibits the transient commercial use of residential property for remuneration in the R-1 District—regardless of who the parties are. Because Ordinance No. 89-17 focuses on use, rather than users, it does not violate fundamental rights and does not warrant stricter scrutiny than is normally accorded zoning laws.

Even if their privacy rights are not violated by Ordinance No. 89-17 itself, plaintiffs fear the means by which Carmel will detect violations of the ordinance. Plaintiffs allege that Carmel attempted to enforce earlier versions of the ordinance by monitoring houses and license plate numbers and by dispatching letters and police officers to the homes of suspected violators. Plaintiffs contend such methods would violate their right to privacy. Just as we do not presume to know precisely how Carmel will interpret

Ordinance No. 89-17, we also do not presume to know precisely how Carmel will detect violators. But we shall not assume that Carmel intends to invade constitutional rights. Review of Carmel's specific application and enforcement of the ordinance, if appropriate, must await another day. (See *Euclid v. Ambler Co., supra,* 272 U.S. at pp. 395-397 [71 L.Ed. at pp. 313-315]; *People v. Wingo* (1975) 14 Cal.3d 169, 180 [121 Cal.Rptr. 97, 534 P.2d 1001] ["A statute valid on its face may be unconstitutionally applied"].)

Because we conclude that Carmel has not violated plaintiffs' constitutional rights, we do not reach their arguments under 42 United States Code sections 1983 and 1988.

DISPOSITION

The judgment is affirmed.

Capaccioli, Acting P. J., and Cottle, J., concurred.

APPENDIX B

Sixth Appellate District No. H007702
S023822

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JOHN W. EWING Et Al., Appellants

v.

CITY OF CARMEL-BY-THE-SEA, Respondent

Petition for review DENIED.
Baxter, J. is of the opinion the petition should be granted.

LUCAS
Chief Justice

APPENDIX C

CITY OF CARMEL-BY-THE-SEA

CITY COUNCIL

ORDINANCE NO. 89-17

AMENDING AND RESTATING ORDINANCE 88-24 RELATING TO TRANSIENT COMMERCIAL USE OF RESIDENTIAL PROPERTY IN THE R-1 DISTRICT.

THE CITY COUNCIL OF THE CITY OF CARMEL-BY-THE-SEA DOES ORDAIN AS FOLLOWS:

Section 1. FINDINGS AND PURPOSES.

A. The purpose of the R-1 District is to provide an appropriately zoned land area within the City for permanent single-family residential uses and structures and to enhance and maintain the residential character of the City.

B. The use of single-family residential property for bed and breakfast, hostel, hotel, inn, lodging resort, or other transient lodging purposes is found to be a commercial use and is thus inconsistent with the purposes and objectives of the R-1 District.

C. Commercial use of single-family residential property for such purposes create unmitigatable, adverse impacts on surrounding residential uses including, but not limited to, increased levels of commercial and residential vehicle traffic, parking demand, light and glare, and noise detrimental to surrounding residential uses and the general welfare of the City. Such commercial use may increase demand for public services,

including, but not limited to police, fire, and medical emergency services, and neighborhood watch programs.

D. Prohibiting such commercial use of single-family residential property in the R-1 District, and restricting such uses to sites authorized or permitted by the Carmel Municipal Code is necessary to maintain the integrity of the R-1 District.

E. This Ordinance implements 1988 revised General Plan Objection O1-12 which provides: "Intensify enforcement of zoning codes to maintain the residential character of the city.

F. This Ordinance implements 1988 revised General Plan Policy P1-37 which provides: "Review and develop measures to restrict commercial short term rental of single family residences in the R-1 district."

G. This Ordinance implements 1988 Revised General Plan Policy P3-12 which provides: "Preserve existing permanent housing and maintain the vital residential character of Carmel-by-the-Sea. Prohibit expansion of visitor oriented commercial uses such as transient rentals."

H. This Ordinance implements 1988 Revised General Plan Policy P3-18 which provides: "Encourage the conversion of commercial transient housing to housing for permanent residents."

I. Government Code Section 65860 provides: "Zoning ordinances shall be consistent with the General Plan."

J. In relation to the size of the R-1 District, the City provides sufficient accommodations for transient visitors in the commercially zoned districts where approximately 950 transient units exist.

K. After consideration of alternative means of achieving the objectives and intent of this Ordinance, it is determined that no effective means of achieving the objectives herein enumerated exists except by enactment of this Ordinance.

Section 2. AMENDMENT AND RESTATEMENT OF SECTION 17.04.710 OF THE CARMEL MUNICIPAL CODE.

Section 17.04.710 of the Carmel Municipal Code is amended and restated in its entirety to read as follows:

> "Transient" means a period of time less than thirty (30) consecutive calendar days.

Section 3. ADDING SECTION 17.04.055 TO THE CARMEL MUNICIPAL CODE.

Section 17.04.055 of the Carmel Municipal Code is added to read as follows:

> "Remuneration" means compensation, money, rent, or other bargained for consideration given in return for occupancy, possession or use of real property.

Section 4. AMENDMENT AND RESTATEMENT OF SECTION 17.08.020 OF THE CARMEL MUNICIPAL CODE.

Section 17.08.020 of the Municipal Code is amended and restated in its entirety to read as follows:

Section 17.08.020 TRANSIENT COMMERCIAL USE OF RESIDENTIAL PROPERTY FOR REMUNERATION IS PROHIBITED.

A. PURPOSE.

The purpose of this Section is to:

1. Preserve and enhance the character of the R-1 District.

2. Promote the public health, safety and general welfare of the City.

3. Expressly prohibit Transient commercial Use of Residential Property for Remuneration, which uses are inharmonious with and injurious to the preservation of the residential character and environment of the City.

4. Implement provisions of the General Plan, and advance the purposes and objectives of Title 17 of the Carmel Municipal Code.

B. DEFINITIONS.

1. Except as otherwise defined or where the context otherwise indicates, the following defined words shall have the following meaning:

   a. "Person" means an individual, a group of individuals, or an association, firm, partnership, corporation or other entity, public or private.

   b. "Remuneration" means compensation, money, rent, or other bargained for consideration given in return for occupancy, possession or use of real property.

   c. "Residential Property" means any single-family dwelling unit or structure located on one or more contiguous lots of record in the R-1 District.

d. "Transient" means a period of time less than thirty (30) consecutive calendar days.

e. "Transient Commercial Use of Residential Property" means the commercial use, by any person, of Residential Property for bed and breakfast, hostel, hotel, inn, lodging, motel, resort or other transient lodging uses where the term of occupancy, possession or tenancy of the property by the person entitled to such occupancy, possession or tenancy is for less than thirty (30) consecutive calendar days.

2. The definitions herein include the singular and plural meanings of each defined word.

C. TRANSIENT COMMERCIAL USE OF RESIDENTIAL PROPERTY FOR REMUNERATION IS PROHIBITED.

Transient Commercial Use of Residential Property for Remuneration is prohibited in the R-1 District, except as otherwise expressly permitted by this Code.

D. LIABILITY AND ENFORCEMENT.

1. Any Person acting as agent, real estate broker, real estate sales agent, property manager, reservation service or otherwise who arranges or negotiates for the use of Residential Property in violation of the provisions of this Section is guilty of an infraction for each day in which such Residential Property is used, or allowed to be used, in violation of this Section.

2. Any Person who uses, or allows the use of, Residential Property in violation of the provisions of this Section is guilty of an infraction for each day in which such Resi-

dential Property is used, or allowed to be used, in violation of this Section.

Section 5. AMENDMENT AND RESTATEMENT OF SECTION 17.24.050(D) OF THE MUNICIPAL CODE.

Section 17.24.050(D) of the Carmel Municipal Code is amended and restated in its entirety to read as follows:

> Use of single-family residential property in the R-1 District for commercial use, including, but not limited to, Transient commercial use for bed and breakfast, hostel, hotel, inn, lodging, motel, resort, and other Transient lodging uses for Remuneration, is unlawful except as otherwise provided for in this Code.

Section 6. LIABILITY AND ENFORCEMENT.

A. Any person violating or failing to comply with any of the requirements of this ordinance shall be guilty of an infraction as set forth in Chapter 17.52 of the Carmel Municipal Code.

B. The City Attorney may seek legal, injunctive, or other equitable relief to enforce this Section.

C. The remedies and penalties provided in this Section are cumulative and not exclusive.

Section 7. SEVERABILITY.

A. If any provision of this Ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the Ordinance, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and

shall continue in full force and effect. To this end, provisions of this Ordinance are severable.

B. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase thereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases be held unconstitutional, invalid or unenforceable.

Section 8. EFFECTIVE DATE.

This Ordinance shall become effective thirty (30) days after its final passage and adoption.

PASSED AND ADOPTED by the City Council of the City of Carmel-by-the-Sea this 2nd day of May, 1989, by the following roll call vote:

AYES: COUNCIL MEMBERS: Fischer, Laiolo, White, Wright, Grace

NOES: COUNCIL MEMBERS: None

ABSENT: COUNCIL MEMBERS: None

APPROVED:

/s/Jean Grace
JEAN GRACE, Mayor

ATTEST:

/s/ Jeanne Brehmer
JEANNE BREHMER,
City Clerk

(2)

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

No. 91-1541

In The

Supreme Court of the United States

October Term, 1991

JOHN W. EWING, et al.,

Petitioners,

v.

THE CITY OF CARMEL-BY-THE SEA, et al.,

Respondents.

Petition for Writ of Certiorari to the Sixth Appellate District Court of Appeal for the State of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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No. 91-1541

In The

Supreme Court of the United States

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Respondents.

Petition for Writ of Certiorari to the Sixth Appellate District Court of Appeal for the State of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for writ of certiorari. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

INTEREST OF AMICUS

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in the landmark United States Supreme Court case, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), *Hodel v. Irving*, 481 U.S. 704 (1987), and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The present case involves an egregious violation of federal constitutional rights in the guise of local land use

regulation. The opinion below upholds a regulation that extinguishes a valuable property interest, even though it fails to advance its asserted police-power objectives. The regulation thus fails *both* parts of this Court's threshold standards for regulatory takings:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.

Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

The court below acquiesced in the city's violation of petitioners' fundamental rights by fabricating a rationale for the ordinance based entirely on the court's own fanciful sociological theories. If allowed to stand, the opinion below will constitute a serious setback for individual rights by undermining this Court's careful efforts, over the past two decades, to restore full constitutional protection to private property rights.

STATEMENT OF THE CASE

The City of Carmel-by-the-Sea (City) has a long history of municipal ordinances designed to exclude, harass, or discriminate against nonresidents. Petitioners are residential homeowners in the City who have engaged in the common, lawful activity of renting out their homes to vacationers. In 1989 the City adopted Ordinance No. 89-17, which prohibits petitioners from renting their homes for terms of less than 30 days. Petitioners brought this action challenging the ordinance as a taking of their

property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Although the City's asserted police-power rationale for the ordinance has been shown to be spurious, and the measure extinguishes a valuable interest in private property, the California Court of Appeal declined to apply the close scrutiny demanded by this Court in regulatory takings cases. Instead, the court below applied the discredited "rational basis" standard of review rejected by this Court in *Nollan* and upheld the measure on the basis of the court's own fanciful sociological speculations.

SUMMARY OF ARGUMENT

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This Court has long held that the Takings Clause can be violated by either of two broad categories of state action. Uncompensated physical invasions of property are *per se* violations of the Takings Clause under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Takings Clause is also violated under this Court's regulatory takings doctrine whenever the character of the government's regulatory action is such that it fails to substantially advance legitimate government interests. The same is true when the economic impact is such that it deprives an owner of economically viable use of property. *Agins v. City of Tiburon*, 447 U.S. at 260.

In *Nollan v. California Coastal Commission*, this Court established a requirement of heightened judicial scrutiny for courts examining property regulations challenged as regulatory takings. 483 U.S. at 835 n.3. The deferential standard of review appropriate to due-process inquiries was specifically rejected as inadequate for takings cases. *Id.*

The case at bar involves an unwarranted prohibition of a common and lawful use of private property in order to exclude outsiders from a community. The municipality asserted a boilerplate police-power rationale for this measure, but the court below acknowledged there is no evidence that the prohibited activity has any relationship to the asserted governmental objectives.

Instead of applying the heightened scrutiny required by this Court in *Nollan*, however, the court below retreated to the highly deferential due-process standard of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Thereupon, the appellate court fabricated a wholly novel rationale for the regulation based entirely on the court's own pseudo-sociological speculations. The court then used these unsupported, ad hoc fantasies to uphold the challenged measure against petitioners' takings challenge.

The level of scrutiny applied by the court below is no more than an exercise in judicial imagination to find some way to uphold a patently unconstitutional enactment. This may once have been an appropriate standard of review in due-process cases under *Euclid*. However, this intensely deferential attitude was explicitly rejected by this Court in *Nollan*.

Review should be granted to resolve the conflict that has been created among lower court jurisdictions concerning *Nollan's* requirement of heightened scrutiny in regulatory takings challenges and to prevent future conflicts on this important issue.

ARGUMENT

I

THIS COURT'S HOLDING IN NOLLAN DEMANDS HEIGHTENED JUDICIAL SCRUTINY OF LAND USE REGULATIONS CHALLENGED UNDER THE TAKINGS CLAUSE

In its leading case in the field of regulatory takings, this Court clearly established that land use regulations challenged under the Takings Clause must be subjected to a heightened standard of judicial review. Such enactments may no longer be upheld merely by reference to a "rational relationship" to their asserted objectives:

> [O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the contrary, . . . [w]e have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State *'could rationally have decided'* the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 835 n.3 (citations omitted; emphasis in original).

The heightened scrutiny requirement was recently emphasized by this Court in *Yee v. City of Escondido*,

___ U.S. ___, No. 90-1947, slip op. (Apr. 1992). The regulation at issue in *Yee* was upheld against a claim that it authorized a permanent physical invasion. However, this Court noted that a regulatory takings challenge would have warranted closer scrutiny to determine "whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Yee*, slip op. at 9 (citing to *Nollan*).

II

NOLLAN'S HEIGHTENED SCRUTINY REQUIREMENT HAS BEEN WIDELY NOTED AND FOLLOWED BY COMMENTATORS AND COURTS

Nollan's heightened scrutiny requirement has not languished in obscurity. It has been widely noted and discussed in legal journals and commentaries, often by authors who are openly hostile to the *Nollan* doctrine. A random sample of this literature would include passages such as:

> The *Nollan* decision alarmed land use regulators because it signalled a heightened degree of judicial supervision.

JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 148 (1992).

> The *Nollan* case . . . suggests that a heightened standard of review has replaced the less stringent standard applied by California and Texas courts in cases in which the challenger has alleged a regulatory taking of private property for public purposes without just compensation.

Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The "Second Generation,"* 38 WASH. U. J. URB. & CONTEMP. L. 55, 100 (1990).

> Nollan marks a move away from the minimal-rationality test that had been used by the Court in its prior takings analysis.

Note, *"Taking" on the Environment: The Takings Clause and Environmental Law—Some Observations,* 36 LOY. L. REV. 1083, 1098 (1991).

> *Nollan* established that a meaningful, heightened, nexus scrutiny of governmental regulation of property rights is, henceforth the governing norm.

Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases,* 70 NEB. L. REV. 186, 211 (1991).

Citations to a representative selection of additional published references to *Nollan's* heightened scrutiny requirement have been appended to this brief as Appendix A. Given this extensive body of literature, it is hard to imagine that the court below could have been unaware that this Court has mandated a heightened standard of review for claims such as petitioners'.

In addition to receiving widespread coverage in the legal literature, *Nollan's* requirement of heightened scrutiny in regulatory takings cases has been recognized and applied by state courts faced with federal takings claims brought under the Fourteenth Amendment.

> [Regulatory takings challenges require] "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" as articulated in *Nollan*.

Seawall Associates v. City of New York, 542 N.E.2d 1059, 1068 (1989).

> Nollan . . . changed the standard of constitutional review in takings cases. Whether the new standard is described as "substantial relationship," or "heightened scrutiny," it is clear the rational basis test . . . no longer controls.

Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal. App. 3d 1260, 1270 (1991).

Recently, however, some lower courts have fallen into error on this point. For example, a brief filed with the California Supreme Court opposing review of the decision below cites *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), for the erroneous proposition that *Nollan* does not require heightened scrutiny. And in an even more bizarre ruling, a California court has proclaimed that *Nollan* does not apply to regulatory takings cases at all. *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164 (1992). Although obviously flawed and implicitly overruled by *Yee*, these aberrant decisions have created a conflict among state and federal jurisdictions on this vital issue. They underscore the need for this Court to grant the writ of certiorari sought by petitioners in order to resolve conflicts among the jurisdictions over the heightened scrutiny requirement set forth in *Nollan*.

III

REJECTION OF THE HEIGHTENED SCRUTINY REQUIREMENT BY THE COURT BELOW HAS DEPRIVED PETITIONERS OF FEDERAL CONSTITUTIONAL SAFEGUARDS GUARANTEED TO ALL AMERICANS

The court below expressly recognized that petitioners raised a regulatory takings challenge under the United States Constitution. *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App. 3d 1579, 1583 (1991). Disregarding the plain teaching of this Court, however, the California panel declined to apply any meaningful scrutiny to the ordinance at issue.

The City cloaked Ordinance No. 89-17 in a boilerplate police-power rationale, claiming that the occasional rental of private homes causes increased traffic, parking problems, light, glare, and noise. *Ewing*, 234 Cal. App. 3d at 1589. The appellate court properly looked behind this asserted rationale and found that it had no basis in fact. *Id.* at 1589-90.

At this point, the heightened scrutiny demanded by *Nollan* permits only one outcome. Since the prohibited property use has been shown not to cause the problems purportedly addressed by the ordinance, the ordinance cannot possibly "substantially advance" the mitigation of these problems. Because it fails to substantially advance the City's asserted purposes, the ordinance must be struck down as unconstitutional under *Nollan*.

Instead, the court below embarked on a breathtaking exercise of uninformed sociological theorizing in a quest to salvage the ordinance. On its own authority and with

no evidence before it, the appellate court proclaimed that vacation renters do not become little league coaches, scout troop leaders, or hospital volunteers—and therefore that banning such individuals from the community comprises a legitimate state interest in itself! *Ewing*, 234 Cal. App. 3d at 1591.

On its face, this burlesque of legal reasoning entails a rejection of any meaningful concept of heightened scrutiny. Indeed, the court below acknowledges that it seeks only to find some "rational relationship" between the City's ordinance and some governmental objective. *Id.* at 1596. The California court's application of an inadequate standard of review is highlighted by its reliance on a 70-year-old due-process case, *Euclid v. Ambler Realty Co.* *Euclid's* intensely deferential standard of review may still be appropriate to due-process inquiries, but it is manifestly inadequate for regulatory takings challenges. *See Nollan*, 483 U.S. at 835 n.3.

CONCLUSION

The rejection of *Nollan's* heightened scrutiny requirement by the court below, and its resurrection of the deferential due-process standard of *Euclid*, is more than a simple mistake in the application of federal constitutional law. Rather, it amounts to a denial of fundamental rights guaranteed by the United States Constitution. The appropriate standard of judicial review is not a mere procedural detail. In close cases, the level of scrutiny determines the outcome of litigation. *See* R. S. Radford,

Statistical Error and Legal Error, 21 LOY. L.A. L. REV. 843, 870-79 (1988). In the context of regulatory takings, the level of scrutiny determines whether individual property rights will be protected against predatory and confiscatory regulations or not.

While California courts may be justified in departing from federal precedent in order to extend *greater* constitutional protections to California citizens than the federal courts provide, such is manifestly not the case here. To the contrary, the California Court of Appeal has *deprived* petitioners of important rights recognized and protected by the decisions of this Court.

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari should be granted.

DATED: April, 1992.

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APPENDIX A

PUBLISHED CITATIONS TO THE HEIGHTENED SCRUTINY REQUIREMENT OF *NOLLAN v. CALIFORNIA COASTAL COMMISSION*

Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 NEB. L. REV. 186, 210-12 (1991).

Robert K. Best, *The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules for Exactions*, 10 ZONING & PLAN. L. REP. 153 (Sep.-Oct. 1987).

Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The "Second Generation,"* 38 WASH. U. J. URB. & CONTEMP. L. 55, 100 (1990).

Bruce W. Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy,"* 44 ARK. L. REV. 65, 99 (1991).

Comment, *"Get It Right the First Time": A Message from the Supreme Court to Land Use and Environmental Regulators—A Comment on Nollan and First English*, 7 UCLA J. ENVT'L L. & POL'Y 173, 177-78 (1988).

Comment, *Justice Stevens' Pro-Land Use Planning Views and Recent Regulatory Takings Cases*, 21 URB. LAW. 579, 584 (1989).

Michael H. Crew, *Development Agreements After Nollan v. California Coastal Commission, 483 U.S. 825 (1987)*, 22 URB. LAW. 23, 34-37 (1990).

Gary Eisenberg, *Property: The Takings Clause of the Fifth Amendment*, 1988 ANN. SURV. AM. L. 1101, 1122.

James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 148 (1992).

William A. Falik & Anna C. Shimko, *The "Takings" Nexus: The Supreme Court Chooses a New Direction in Land-Use*

Planning: A View from California, 39 HASTINGS L. J. 359, 390 (1988).

Daniel R. Mandelker, LAND USE LAW §2.23 at 45 (2d ed. 1988).

Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. COLO. L. REV. 599, 613 (1991).

Note, *A Constitutional Standard of Review for Permit Conditions, Exactions, and Linkage Programs: Nollan v. California Coastal Commission*, 30 B.C. L. REV. 903, 926-29 (1989).

Note, *Nollan v. California Coastal Commission: Unprecedented Intrusion Upon a State's Judgment of the Proper Means To Be Applied in Land Use Regulation*, 21 J. MARSHALL L. REV. 641, 648-49 (1988).

Note, *The Supreme Court, 1986 Term: Leading Cases*, 101 HARV. L. REV. 119, 245, 247 (1987).

Note, *"Taking" on the Environment: The Takings Clause and Environmental Law--Some Observations*, 36 LOY. L. REV. 1083, 1098 (1991).

Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L. J. 335 (1988).

Bart H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1450 n.1 (1990).

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vs.

CITY OF CARMEL-BY-THE-SEA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Sixth Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Is it an impermissible taking under the Fifth Amendment to the United States Constitution for a City to adopt a zoning regulation that prohibits use of single-family dwellings in residential districts as short-term or vacation rentals?

2. Is a zoning ordinance which (i) prohibits use of single-family dwellings in residential districts as short-term or vacation rentals and (ii) regulates the relationship between a property owner and tenant by establishing a minimum tenancy for dwellings rented in a single-family residential zoning district, reviewable under the heightened scrutiny standard discussed in *Nollan v. California Coastal Commission*?

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No. 91-1541

In the Supreme Court

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CITY OF CARMEL-BY-THE-SEA, et al.,
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On Petition for a Writ of Certiorari to the Court of Appeal of California, Sixth Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of Carmel-by-the-Sea, a municipal corporation ("Respondent" or "Carmel"), respectfully requests that this Court deny the petition for certiorari, seeking review of the opinion of the Court of Appeal of California, Sixth Appellate District, in this case. That opinion is reported at 234 Cal. App. 3d 1579 (1991).

STATEMENT OF THE CASE

Petitioners seek review of the decision of the California Court of Appeal in this case on the basis that this Court's decision in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), requires California courts to apply heightened scrutiny when reviewing a land use ordinance challenged under the Fifth Amendment to the United States Constitution. Respondent disagrees, and submits that the Court of Appeal correctly upheld

the Ordinance using the rational basis standard and that there is no federal question at issue.

The City of Carmel-by-the-Sea enacted Ordinance No. 89-17 as a part of its comprehensive zoning scheme and pursuant to its 1988 Revised General Plan.[1]

The purposes of the Ordinance are (i) to prohibit single-family homes from use as short-term or vacation rental units, (ii) to maintain the residential character and stability of the R-1 district[2] and (iii) to preserve existing permanent housing within the City. Absent this regulation, the City's R-1 district would confront increasing conversion of permanent housing into short-term rental units and encroachment by non-residential uses.

To accomplish the City's land use objectives, the Ordinance designates rental uses for less than 30 days in length as a commercial land use. Month-to-month or longer term rentals are deemed residential uses and are not subject to local regulation. This distinction between residential and transient/commercial rental uses enables the City to maintain separate zoning districts for each kind of use—including visitor accommodations—within the city. The record below indicates that some 950 lawful transient units exist (between bed and breakfast, hotel, motel and similar establishments) within Carmel which has a population of under 5,000 persons. (App. A to Petition, p. 12.)

Petitioners own single-family dwellings in the R-1 district which they rent on a daily or other short-term basis. These rental uses are transient lodging businesses operating as residentially zoned properties. Contrary to this Ordinance and pre-existing zoning regulations, Petitioners seek business profits from single-family home ownership. Petitioners claim that because their properties are located in the R-1 district, any kind of tenancy—including overnight rentals—is a residential use not subject to municipal zoning regulation. This claim ignores the obvious

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[1] Calif. Govt. Code § 65100 et seq.

[2] The purpose of Carmel's R-1 district is to provide an area for permanent single-family residential uses and permitted home occupations. See Carmel Municipal Code Chapter 17.24.

distinction between residential and commercial uses, and the equally obvious difference between a private home and a house held out to the public as a vacation rental unit.

The Court of Appeal reviewed the Ordinance using the rational basis standard. The court below rejected each of Petitioners' claims and upheld the decision of the trial court that Ordinance No. 89-17 was a valid land use regulation. The California Supreme Court declined review and this petition followed.

REASONS WHY THE PETITION SHOULD BE DENIED

I

The Court Of Appeal Properly Used The Rational Basis Standard For Judicial Review Of A Non-Possessory Land Use Regulation

Petitioners contend that a land use regulation challenged as a regulatory taking must be reviewed using the heightened scrutiny standard discussed in *Nollan v. California Coastal Commission,* supra.[3] This demand for heightened or strict scrutiny is grounded on (i) an erroneous assumption that *Nollan* requires strict scrutiny in all regulatory takings cases and (ii) incorrect extension of the factual and legal setting of the *Nollan* case,which involved a physical taking of property in the form of a permit condition, to a facial challenge to a land use ordinance.

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[3] Recently, the Ninth Circuit rejected application of strict scrutiny in a regulatory taking claim in *Commercial Builders v. Sacramento,* 941 F. 2d 872 (9th Cir. 1991), holding that strict scrutiny was applicable only in physical takings cases where no evidence exists of a nexus between the exaction and the proposed development. Other circuits have also rejected application of heightened scrutiny to nonpossessory takings cases. See *St. Bartholomew's Church v. City of New York,* 914 F. 2d 348 (2nd Cir. 1990); cert. denied sub nom. *Committee to Oppose Sale of St. Bartholomew's Church v. Rector,* ____ U.S. ____ (1991); *Adolph v. Federal Emergency Management Agency,* 854 F. 2d 732, 737 (5th Cir. 1988); and *Naegele Outdoor Advertising, Inc. v. City of Durham,* 844 F. 2d 172, 178 (4th Cir. 1988).

The gist of Petitioners' claim is that the Court of Appeal ". . . ignored *Nollan's* clear instruction that courts must exact land use regulations to heightened scrutiny . . . ." (Petition at 9.) This proposition is simply wrong and incorrectly states the limited circumstances in which heightened scrutiny may be applicable.

The Court of Appeal used the rational basis standard because no Federal or California court has decided that heightened scrutiny is required in a regulatory takings case, and Petitioners cited no authority for their proposition beyond *Nollan*. Since this Court's decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the rational basis standard has been the accepted standard of review in zoning cases. *Id.* at 386.

While *Nollan* discussed the need for a "substantial" nexus between a permit condition or exaction and the burden placed on the property owner, it did not renounce the rational basis standard in cases such as this.

In two similar subject cases decided after *Nollan*, this Court declined to apply strict scrutiny. First, in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), this Court upheld a residential rent control and eviction ordinance adopted by the City of San Jose finding it rationally related to its stated purposes (quoting *New Orleans v. Duke*, 457 U.S. 297, 303 (1976)). Likewise, in *Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. 470 (1987), this Court rejected the notion that "courts have a license to judge the effectiveness of legislation, or that courts are to undertake [a] 'least intrusive alternative' analysis . . . ." *Id.* at 487 n. 16.

Examination of the purpose and scope of City Ordinance No. 89-17 discloses that it falls well within the ambit of traditional zoning regulations long held reviewable using the rational basis standard. The Ordinance does not involve a physical taking, exaction or permit condition. Far from being a new kind of development restriction or a regulation affecting only a small class of property owners, this Ordinance is a standard use restriction of the type discussed by Chief Justice Rehnquist's dissenting opinion in *Penn Central Transportation Co. v. New York City*, 438 U.S. 107, 139-140 (1978). Chief Justice Rehnquist distinguished between a zoning case and a takings case on the basis of the

breadth of the restriction and whether the burden was placed on a single property or on all property owners similarly situated. A uniform use restriction was held to not effect a taking since no benefit accrues to the public generally at the expense of a single property owner. Likewise, this Ordinance imposes no such burdens.

The effect of this Ordinance is to merely limit short-term rentals to properties zoned for commercial uses. This is a necessary and valid land use distinction. Moreover, the Ordinance does not affect long-term rental uses nor infringe on owner-occupancy of single-family dwellings. Neither is the Ordinance limited to specific properties, except that Petitioners' properties are among those which are the cause of the problem which the City seeks to cure. The uniform application of the Ordinance to the entire R-1 district creates an uphill burden to any due process or equal protection challenge. Petitioners have clearly not satisfied this burden.

Since no California or Federal court has held that a land use regulation, such as City Ordinance No. 89-17, is *de facto* reviewable—post *Nollan*—under a strict scrutiny standard absent a showing that the challenged regulation is also flawed on other grounds, review of the opinion below is not needed.

II

Local Legislative Bodies May Adopt Zoning Regulations That Indirectly Regulate The Landlord-Tenant Relationship By Restricting Short-Term Or Vacation Rental Units To Commercially Zoned Properties

This Court has long recognized that the landlord-tenant relationship is itself subject to extensive state and local regulation. See, e.g., *Lindsey v. Normet,* 405 U.S. 56, 72 (1972). These regulations fall into two broad classes. First, land use regulations often provide separate zoning districts for single-family dwellings, multi-family housing units, senior citizen housing and short-term or vacation lodgings based on local criteria. See *Euclid v. Ambler Realty Co.,* supra Second, the government may regulate rents, health and safety conditions, selection of tenants and other

aspects of the leasehold. See *Pennell v. City of San Jose,* supra; *Fisher v. City of Berkeley,* 475 U.S. 260 (1986).

In this case, the City's need to distinguish single-family residential use from commercial uses, such as a short-term or vacation rental units, arises from the City's goal that its R-1 district be maintained for its intended purpose—a zone for single-family residences free from commercial uses. This most fundamental zoning objective required the City to establish criteria for classifying short-term versus long-term rental uses. The City Council adopted 30 days as the dividing line between these two uses, and only in this limited manner does the Ordinance touch the landlord-tenant relationship.

The principal issue here is not residential uses per se, but rather in which zone can each category of use be established. On that basis alone, the Court of Appeal correctly set aside Petitioners' argument that Ordinance No. 89-17 restricts "residential" uses.

Petitioners have also not overcome the argument that ". . . a property owner who voluntarily enters the rental housing market necessarily yields a modicum of control." Manheim, *Tenant Eviction Protection and the Takings Clause,* (1989) Wis. L. Rev. 925, 1002. And as this Court noted in *Reitman v. Mulkey,* 387 U.S. 369, 385-386 (1967), property placed in the public domain is subject to regulation. Having decided to rent their properties, Petitioners cannot then argue that these properties retain the characteristics of a private home. And indeed the effect of this Ordinance on the property owner is less intrusive than rent control or other economic regulations upheld by this Court.

Likewise, Petitioners' contention that "[t]he decision below grants municipalities unfettered authority to limit residential use of property simply by designating it as commercial use" is equally false. (Petition at 10.) While Petitioners' indirectly assert that the Ordinance violates due process and equal protection safeguards, the government is free to select only those areas or classes of property where the need for regulation exists, without running afoul of these protections. *Woods v. Clyd W. Miller Co.,* 333 U.S. 138, 145 (1948).

Lastly, the Court of Appeal did proceed with an ad-hoc factual inquiry into the purposes and means of the Ordinance. The court below concluded that the Ordinance was entirely consistent with accepted Federal and California decisions in this Field. No federal authority has been cited by Petitioners which casts doubt on the opinion below, and the California Supreme Court declined to review the case.

Carmel's regulatory efforts in this field are nothing new. The Court of Appeal correctly determined that the Ordinance's purposes and means were legitimate exercises of the City's police powers.

III

Lower Courts Have Not Reached Conflicting Decisions On The Standard Of Review Applicable To Facial Challenges Of Land Use Regulations

Lower courts have not reached conflicting decisions with respect to (i) use of the rational basis standard in regulatory takings cases nor (ii) whether a zoning regulation which restricts, but does not eliminate, a property owner's economic use of his property is a taking or not.

In upholding City Ordinance No. 89-17, the Court of Appeal correctly applied rules of construction and analysis established by this Court in decisions ranging from *Euclid v. Ambler Realty Co.*, supra, through *Village of Belle Terre v. Boraas*, 416 U.S. 1 1974, and most recently, *Yee v. City of Escondido*,60 U.S.L.W. 4301 (U.S. April 1, 1992) (No. 90-1947). In each case, this Court upheld the broad authority of state and local government to establish zoning districts, decide on which uses are appropriate to each district and to regulate housing conditions.

Petitioners have not cited any authorities which suggest that Federal or State courts have reached conflicting decisions on the subject matter of this case, nor on any federal question decided by the Court of Appeal.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Dated: April 17, 1992

Respectfully submitted,

DONALD G. FREEMAN,
City Attorney
City of Carmel-by-the-Sea

Supreme Court, U.S.
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(4)

No. 91-1541

In The

Supreme Court of the United States

October Term, 1991

JOHN W. EWING, et al.,

Petitioners,

v.

CITY OF CARMEL-BY-THE-SEA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California Sixth Appellate District

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INTEREST OF AMICI CURIAE

Amici curiae are 43 cities throughout the State of California who participated in the challenged Court of Appeal case. The parties have consented to the submission of this brief pursuant to Supreme Court Rule 37.2.

California cities are authorized under the State Constitution to regulate land use by creating districts within the municipality for specified uses. A city's zoning ordinance establishes permissible and impermissible uses for each district. Commercial uses are commonly restricted in residential districts to protect the residential character of the city's neighborhoods.

Municipal zoning authority has been repeatedly upheld by this Court, so long as it is rationally related to its stated purpose and does not work an unconstitutional taking. Petitioners seek to undermine the traditional deference shown to exercises of the zoning power. Their so-called takings claim masks Petitioners' dissatisfaction with the line drawn by Carmel between commercial and residential areas. The granting of the writ of certiorari would invite federal takings challenges to every municipal zoning regulation delineating permissible and impermissible uses in every zoning district. Amici therefore respectfully ask this Court to deny the writ.

STATEMENT OF THE CASE

Zoning Ordinance No. 89-17 ("Ordinance") was enacted to preserve the residential character of Carmel's neighborhoods by creating an area for permanent single-

family residential uses. The Ordinance prohibits transient commercial rentals of homes in neighborhoods zoned R-1. Transient commercial rentals are defined to mean rentals for less than 30 days. Ample accommodations for such vacation rentals exist in other parts of the City.

The Ordinance's restrictions are a direct reflection of the policy in Carmel's General Plan to protect the City's residential core from encroachment by visitor-oriented uses. The Ordinance applies to all single-family properties in the R-1 Zoning District. No single-family properties within that district are excluded. None is subject to greater or lesser restrictions on short-term occupancies.

Although the Petitioners did not raise any takings claim before the trial court, the Court of Appeal considered the Ordinance's relationship to its goal of enhancing and maintaining the residential character of the R-1 Zoning District and found that relationship or nexus to be legally sufficient.

Petitioners do not claim that the Ordinance deprives them of all economic use of their property, involves a physical invasion of their property, or singles them out to bear a burden that should be borne by the public as a whole. Accordingly, their Petition does not substantiate their claim that the Ordinance effects a taking of their property.

The second question of the Petition argues that the Court of Appeal decision grants municipalities excessive authority to delineate between permissible residential and impermissible commercial uses. However, this claim rests entirely on alleged state law interpretations of the terms "commercial" and "residential."

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEAL'S DECISION IN UPHOLDING THE ORDINANCE IS CONSISTENT WITH THE DECISIONS OF THIS COURT

The rational basis test that has been the accepted standard for review of zoning ordinances since this Court's decision in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926). California courts have consistently adhered to this standard. *See, e.g., Associated Home Builders etc., Inc. v. City of Livermore*, 18 Cal. 3d 582, 604-605, 135 Cal. Rptr. 41, 557 P.2d 473 (1976).

Petitioners now ask this Court to overrule *Euclid* and the 66 years of subsequent case law by imposing a higher standard of judicial review. Their circular reasoning is as follows: *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) requires the use of heightened judicial scrutiny in regulatory takings cases. Petitioners have claimed that the Ordinance's zoning restrictions constitute a regulatory taking, thus heightened scrutiny is required despite the absence of any substantiation in the Petition that the Ordinance has taken anything from Petitioners.

If the mere allegation of a regulatory taking were sufficient to trigger heightened judicial scrutiny, there would be no further place for the rational basis test accepted by the courts as the general standard in zoning cases. However, one reads *Nollan* and its progeny in vain for any indication that *Euclid* has been overruled.

This Court recently clarified the scope of the *Nollan* decision in *Yee v. City of Escondido*, 60 U.S.L.W. 4301 (U.S.

April 1, 1992) (No. 90-1947). Where the government *physically* encroaches on private property, the takings clause generally requires compensation. Where the government merely regulates use, a takings claim is raised only where the purpose of a regulation or the extent to which it deprives the owner of the economic benefit of property suggests that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. *Id.* at 4302.[1] Petitioners have not contended they are so burdened nor would such a contention be plausible: The Ordinance applies equally to all single-family properties within the R-1 District and Petitioners share the benefit and burden of its restrictions with their neighbors.[2]

Petitioners' suggestion that *Nollan* changed the level of scrutiny applicable to takings is inconsistent with both *Nollan* and *Nollan*'s interpretation in every Circuit. *See, e.g., Nollan, supra,* 483 U.S. at 835, 839; *Commercial Builders v. City of Sacramento,* 941 F.2d 872, 873-4 (9th Cir. 1991),

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[1] The *Yee* decision also emphasized that a regulatory takings claim requires a complex factual assessment of the purposes and effects of government action. Petitioners' failure to present their takings claim at the trial level necessarily hamstrings this Court in determining if a taking has occurred.

[2] The distinction between a zoning case and a takings case was described in Justice Renquist's dissenting opinion in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 139-140 (1978). In a zoning case, a prospective use of a piece of property is prohibited by restrictions on all property owners in the zoning district, for the common benefit of one another. A taking occurs if the restriction imposes an affirmative burden on a landowner for the benefit of the public. The Ordinance imposes no such burden.

and the cases cited therein. However, the appropriate standard of review is not relevant in this case because the Petitioners do not have a takings claim. Given the absence of any taking, this case falls squarely within the long line of this Court's opinions regarding public welfare zoning ordinances. It is settled that such ordinances are evaluated by the rational basis test. *See, e.g., Berman v. Parker,* 348 U.S. 26, 32-33 (1954); *Village of Belle Terre v. Boraas,* 416 U.S. 1, 7 (1974).

Lastly, it should be noted that the Ordinance was upheld because the Court of Appeal found that (i) the government has a legitimate interest in preserving residential character; *and* (ii) residential character is threatened by the conversion of homes in residential areas to short-term rentals occupied by a stream of vacationing tenants. This reasoning demonstrates that the court, in fact, found that a close and substantial relationship exists between the Ordinance and its stated goals, consistent with the level of scrutiny requested by Petitioners, and beyond the "sufficient nexus" required by *Yee.* 60 U.S.L.W. at 4304.

II. PETITIONERS' ATTACK ON THE ORDINANCE'S DISTINCTION BETWEEN COMMERCIAL AND RESIDENTIAL USES DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

The Ordinance was adopted by Respondent City in order to protect the residential character of the R-1 District from encroachment by commercial, visitor-serving uses.

The police power of California cities includes a broad zoning authority. *See Associated Home Builders, supra,* 18 Cal. 3d at 604. Under the police power, cities may distinguish between commercial and residential uses. *See County of Butte v. Bach,* 172 Cal. App. 3d 848, 865, 218 Cal. Rptr. 613 (1985). The Federal Constitution allows the exercise of this line-drawing authority to protect the charm, spiritual and family values and "blessings of quiet seclusion" of residential neighborhoods so long as the lines drawn are reasonable and not arbitrary. *Village of Belle Terre v. Boraas,* 416 U.S. 1, 6, 8, 9 (1974), citing *Berman v. Parker,* 348 U.S. 26 (1954). *See also Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 129 (1978).

In tacit acknowledgment of Carmel's broad zoning power under the decisions of this Court, Petitioners do not cite any federal cases in support of their suggestion that Carmel has overstepped its powers in delineating between commercial and residential uses. Petitioners instead argue that the Ordinance is contrary to a settled definition of "commercial use of residential property" under *state* law. However, it is axiomatic that this Court is without jurisdiction to review claims based on state law. *New York Central & Hudson River Railroad Company v. City of New York,* 186 U.S. 269, 272-273 (1902).

In any event, the fallacy of Petitioners' attack is demonstrated by the very cases cited in the Petition. In both *City of Beverly Hills v. Brady,* 34 Cal. 2d 854, 215 P.2d 460 (1950) and *Sechrist v. Municipal Court,* 64 Cal. App. 3d 737, 134 Cal. Rptr. 733 (1976), the courts showed great deference to the cities' zoning powers. Neither case endorsed fixed definitions of "commercial" and "residential," but construed those terms according to the purposes

intended to be served by the zoning ordinance. *See also County of Butte, supra,* 172 Cal. App. 3d at 865. "[E]ven a semblance of commercial activity, incidental to the use of residential property . . . may be an excludable use of residential property if it might affect the 'residential character' of the neighborhood." *Sechrist, supra,* 64 Cal. App. 3d at 746.

Petitioners' claims that the Ordinance's distinctions are arbitrary shows a blatant disregard for the planning and zoning laws of the State of California. The Ordinance directly reflects a policy in Respondent City's General Plan mandating the preservation of permanent residential housing against the expansion of visitor-oriented commercial uses, including short-term rentals. A city's zoning ordinance must be consistent with its adopted general plan. *Lesher Communications, Inc. v. City of Walnut Creek,* 52 Cal. 3d 531, 536, 277 Cal. Rptr. 1, 802 P.2d 317 (1990). Far from being arbitrary, the Ordinance's distinction between commercial and residential uses reflects the principles laid down for the guidance of all municipal land use decisions in the General Plan, the City's "constitution for development." *See Citizens of Goleta Valley v. Board of Supervisors,* 52 Cal. 3d 553, 570, 276 Cal. Rptr. 410, 801 P.2d 1161 (1990).

CONCLUSION

The Petition utterly fails to set forth the basis for a takings claim or to demonstrate any deviation by the Court of Appeal from the decisions of this Court. Accordingly, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

McCUTCHEN, DOYLE, BROWN & ENERSEN

Dated: April 22, 1992

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